IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOEL I. SHER in his capacity as Chapter 11 Trustee for TMST, INC., f/k/a THORNBURG MORTGAGE, INC., *et al.*, Plaintiff, v. JP MORGAN CHASE FUNDING INC., *et al.*, Defendants.	Adv. Proc. No. 11-0340-NVA United States Bankruptcy Court for the District of Maryland
JP MORGAN CHASE FUNDING INC., *et al.*, Movants, v. LEGACY DCP, LLC (f/k/a DYNAMIC CREDIT PARTNERS, LLC), Opponent.	Misc. Proc. No. 17-00405-MKV Related to Dkt. No. 1

NON-PARTY MATLINPATTERSON GLOBAL ADVISERS LLC'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY NON-PARTY LEGACY DCP, LLC (f/k/a DYNAMIC CREDIT PARTNERS, LLC)

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Non-party MatlinPatterson Global Advisers LLC ("MatlinPatterson") respectfully submits this memorandum of law, together with the supporting declaration of Jeffrey Coviello, Esq. (the "Coviello Declaration" or "Coviello Decl."), in opposition to Defendants' motion ("Motion") to compel production of documents by non-party Legacy DCP, LLC (f/k/a Dynamic Credit Partners, LLC) ("Dynamic Credit") [Case No. 17-00405, Dkt. No. 1].

PRELIMINARY STATEMENT

Movants ("Movants" or "Defendants") are defendants in an underlying adversary proceeding brought against them by the Chapter 11 Trustee ("Trustee") of the bankruptcy estates of Thornburg Mortgage, Inc., and its affiliates ("Thornburg"). MatlinPatterson is a non-party to that adversary proceeding, but has been subject to extensive non-party discovery, some of which is ongoing. Defendants have routinely overreached in non-party discovery, concocting discovery disputes that should not exist and engaging in unnecessary motion practice, often over insignificant documents and/or materials already in their possession. This is another example.

After receiving thousands of valuation-related documents (with more soon on the way), Defendants now want each and every one of a modest collection of documents (53 e-mail families) that Dynamic Credit withheld as privileged, contending that no privilege can ever apply to communications with an "ordinary financial advisor." Motion ¶ 28. Defendants are wrong. The documents at issue include e-mail communications between counsel, its client MatlinPatterson (a distressed debt investor), and a client advisor performing specialized diligence and analyses on complex financial instruments, financing arrangements and underlying collateral. The communications were sent with an expectation of confidentiality and either supported the legal advice the client received, or actually reflected the legal advice sought or received. In these circumstances, there is no question that the communications are privileged. Accordingly, the Motion should be denied.

BACKGROUND

1. Defendants allegedly served a subpoena on Dynamic Credit on or about November 4, 2016, which subpoena is identified as Exhibit 1 to the Motion (the "Subpoena").

2. From the outset—not months later as Defendants suggest (Motion ¶ 13)—MatlinPatterson stated its interest in protecting any privileged documents covered by the Subpoena to Dynamic Credit. On November 18, 2016, MatlinPatterson timely objected, including to the extent the Subpoena encompassed MatlinPatterson documents and communications and/or other materials in which MatlinPatterson had a personal right or privilege and were protected from disclosure by the attorney-client privilege or other privileges or protections from disclosure. Coviello Decl. Ex. A (J. Coviello e-mail dated 11/18/16).

3. Indeed, some of the same materials were being sought from both MatlinPatterson and Dynamic Credit, underscoring MatlinPatterson's interest in objecting to the Subpoena and this Motion.

4. By way of background, MatlinPatterson has been subjected to significant, burdensome non-party discovery in the adversary proceeding. After making a substantial production of documents to Defendants for the relevant time period, Defendants moved to compel MatlinPatterson to produce many *years*' worth of additional, irrelevant discovery. That motion was overwhelmingly denied except to a very limited extent. The Maryland Bankruptcy Court overseeing the underlying adversary proceeding ordered a supplemental production of a narrow category of valuation-related documents—which were not even a primary focus of the motion to compel—for a limited time period.

5. While the scope of the Court's order is subject to interpretation, in the spirit of compromise MatlinPatterson negotiated and reached agreement with Defendants on a search protocol for a supplemental production of valuation-related documents that will resolve MatlinPatterson's production obligations. That document review is in progress, nearing completion, and is *not* the subject of this Motion.

6. However, before MatlinPatterson and Defendants reached agreement on a search protocol for production of valuation documents directly by MatlinPatterson, Dynamic Credit had already collected valuation-related documents (including communications with MatlinPatterson) for potential production to Defendants pursuant to the separate Subpoena served on Dynamic Credit.

7. As Defendants acknowledge, they agreed that MatlinPatterson could review the responsive documents for privilege before Dynamic Credit produced them to Defendants, and produce a privilege log. Motion ¶ 14.[1]

8. Out of thousands of documents, MatlinPatterson identified a mere 53 e-mails (some with attachments) to be withheld by Dynamic Credit as privileged. When attachments are counted, the total number of withheld documents is 74, not 119 as Defendants contend. Motion ¶ 15.[2]

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[1] Defendants' agreement to this procedure should preclude any challenge to MatlinPatterson's standing to oppose the Subpoena or this Motion. At this point, any such argument should be deemed waived—and wrong on the merits in any event. *See, e.g.*, *Solow v. Conseco, Inc.*, No. 06 CIV. 5988 (BSJ)(THK), 2008 WL 190340, at *3 (S.D.N.Y. Jan. 18, 2008) ("While Rule 45 speaks of objections to subpoenas being asserted by the person commanded to produce and permit inspection of the subpoenaed documents, it is well-established that a party with a real interest in the documents has standing to raise objections to their production.").

[2] Defendants appear to have inflated the number of withheld documents by counting exact duplicates. As Defendants were informed prior to bringing this Motion, exact duplicates were excluded rather than logged multiple times (as is customary practice).

9. MatlinPatterson produced a privilege log related to the Dynamic Credit production to Defendants on March 6, 2017 (the "Privilege Log").

10. Apparently bent on unnecessary motion practice with respect to the Privilege Log documents, on March 31, 2017, Defendants issued an ultimatum to Dynamic Credit and MatlinPatterson: "After a review of the privilege log provided by MatlinPatterson . . . Defendants do not believe any privilege protects the . . . (53 document families) from production. If we do not hear anything further from your clients by the close of business . . . [on] (April 5) regarding an agreement to produce the documents currently being withheld due to alleged privileges, we will assume that your clients stand by their privilege assertions and decisions to withhold the . . . documents from production, and thus, we will proceed to seek redress with the appropriate court." Coviello Decl. Ex. B (T. Wilson e-mail dated 3/31/17).

11. On April 5, 2017, MatlinPatterson informed Defendants, without waiver of any additional or different positions or arguments, that the documents on the Privilege Log are privileged "because they are communications that were made in confidence for the purpose of obtaining legal advice from counsel," and that "[t]he inclusion of Dynamic as agent of / advisor to MatlinPatterson does not waive the privilege" because "Dynamic served a necessary, highly useful, and specialized purpose in facilitating the attorney-client communications and the rendering of legal advice." Coviello Decl. Ex. C (J. Coviello e-mail dated 4/5/17). MatlinPatterson further advised Defendants that "[m]any documents are privileged for the additional reason that they reflect counsel's advice, mental impressions and/or strategies." *Id.*[3]

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[3] As reflected in the e-mail attached as Exhibit C to the Coviello Declaration and in this opposition brief, the Privilege Log documents may be withheld from production on the basis of the attorney-client privilege—which encompasses financial advisors such as Dynamic Credit—and therefore the common interest privilege designations are withdrawn solely as to the specific documents and communications logged on the Privilege Log dated March 6, 2017 concerning the production of documents by Dynamic Credit to Defendants. The withdrawal of these particular common interest privilege designations as to this limited set of documents is not, and should not be construed as, a

12. In this same April 5, 2017 e-mail, MatlinPatterson asked Defendants to reconsider whatever application they were planning and to explain the basis for their disagreement as to the logged documents. *Id.* MatlinPatterson also asked if Defendants withheld any of their own communications with financial advisors or agents on privilege grounds, so as to understand the basis for any disagreement as to Dynamic Credit. *Id.* Defendants simply ignored these requests and filed this Motion ***two days later***.

13. As the Privilege Log reflects—and an *in camera* review would confirm—the withheld documents overwhelmingly fall into a few categories, which must be viewed in context.

14. "***Category One***" is a collection of 43 e-mails and attachments, principally among MatlinPatterson, its legal counsel at Simpson Thacher & Bartlett LLP ("STB"), and Dynamic Credit, during the period March 22, 2008 through March 24, 2008 (Privilege Log Nos. 20-53). These communications concern a potential investment in Thornburg and the launch of interrelated legal, financial and mortgage-related diligence. The e-mails were sent with the expectation of confidentiality, as they are confined to a limited group, including client, counsel and Dynamic Credit.[4] The communications to this limited working group—including Dynamic Credit as a specialized advisor reviewing and analyzing Thornburg's complex financial arrangements, collateral and assets—facilitated counsel's advice on structuring and drafting initial transaction documents ***based on that diligence***. As reflected on the Privilege Log, many of the withheld documents in Category One are counsel's drafts and re-drafts of term sheets—

waiver of the common interest privilege as to any other document, communication or portion of an e-mail chain. Any and all such privilege claims are expressly reserved.

[4] In some instances, the communications are solely among Dynamic Credit personnel or Dynamic Credit and MatlinPatterson personnel, but are part of an e-mail chain that includes forwarded communication from counsel. The attorney-client privilege nevertheless applies. *See S.E.C. v. Wyly*, No. 10 CIV. 5760 (SAS), 2011 WL 3366491, at *6 (S.D.N.Y. July 27, 2011) ("Confidential communications between non-lawyer employees acting as necessary agents which facilitate the lawyers work for the client are cloaked by attorney-client privilege.").

necessarily reflecting counsel's mental impressions, legal strategy, and advice—which took shape through communications with the client and advisors at Dynamic Credit.

15. "***Category Two***" is a collection of 21 e-mails and attachments, principally among MatlinPatterson, its counsel at Bracewell & Giuliani ("B&G") and/or STB, and Dynamic Credit, during the period September 16, 2008 through September 22, 2008 (Privilege Log Nos. 9-18). Each and every communication in Category Two is a draft term sheet for a potential transaction related to Thornburg, or an e-mail discussing or attaching one. As reflected on the Privilege Log, the communications reflect counsel's advice and comments. Again, the e-mails were sent with the expectation of confidentiality as they are confined to a limited working group, including Dynamic Credit, who performed specialized diligence and analyses that supported the legal advice received by the client.

16. "***Category Three***" consists of seven e-mails and attachments among MatlinPatterson, its counsel B&G and STB, and Dynamic Credit on a single day, September 14, 2008 (Privilege Log Nos. 2-8). As reflected on the Privilege Log, these communications concern MatlinPatterson's request for, and receipt of, legal advice related to auction swaps. The e-mails were sent with the expectation of confidentiality as they are confined to a limited working group, including Dynamic Credit, an advisor with specialized knowledge that would aid counsel's understanding of complex auction swap mechanics.

17. "***Category Four***" is a single e-mail (with attachment), dated October 27, 2008, in which MatlinPatterson forwards to and discusses with Dynamic Credit a communication from MatlinPatterson's counsel at Sullivan & Cromwell ("S&C") concerning a mixed question of fact and law within Dynamic Credit's expertise, for the purpose of obtaining legal advice regarding the sale and purchase of securities (Privilege Log No. 19).

18. "***Category Five***" is a single redacted e-mail from August 8, 2008 (Privilege Log No. 1). The top e-mail in the *redacted* portion of the e-mail chain is a confidential communication between MatlinPatterson and its counsel at STB, which does not even include Dynamic Credit and therefore should not even be subject to this Motion.[5] The portion of the e-mail chain that includes Dynamic Credit has been produced in unredacted form as it contains no privileged information.

ARGUMENT

I. THE WITHHELD DYNAMIC CREDIT DOCUMENTS ARE PRIVILEGED

19. As this Court has held, "[a]lthough there are instances where the attorney-client privilege is inapplicable to communications between an attorney and a third-party consultant, ***there is no question that the privilege can apply when the consultant is hired to support the legal advice the client receives***." *In re MarketXT Holdings Corp.*, No. 04-12078 (ALG), 2009 WL 7216076, at *7 (Bankr. S.D.N.Y. Mar. 4, 2009) (citing *U.S. v. Kovel*, 296 F.2d 918, 921-923 (2d Cir. 1961) (emphasis added) (attorney-client privilege extended to work performed by "business consultant" analyzing whether "fair value" had been received in exchange for alleged fraudulent transfer).

20. "What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." *Kovel*, 296 F.2d at 922. So long as there is a reasonable expectation of confidentiality with respect to the communication with the

[5] Because the top e-mail in this chain is between attorney and client, the communication is subject to the attorney-client privilege. Parts of the e-mail chain also concern a dispute about a counter-party's contractual rights and obligations, and therefore the work product doctrine should apply as well. However, because the top e-mail in the chain between attorney and client may be withheld on the basis of the attorney-client privilege and/or work product doctrine, MatlinPatterson withdraws the common interest privilege designation solely as to that portion of the e-mail chain. The withdrawal of this privilege designation as to this limited portion of this e-mail chain is not, and should not be construed as, a waiver of the common interest privilege as to any other document, communication, or portion of an e-mail chain. Any and all such privilege claims are expressly reserved.

third party, the privilege will extend to such communications that are necessary, or at least highly useful, for the client to obtain informed legal advice, such as where the involvement of the third party serves "some specialized purpose" or "specialized function." *Green v. Beer*, No. 06 CIV. 4156 (KMW)(JCF), 2010 WL 2653650, at *3, 4 (S.D.N.Y. July 2, 2010) (citations omitted); *see also Kovel*, 296 F.2d at 922 ("the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit") (emphasis added).[6]

21. These standards are readily satisfied here. First, as the Privilege Log and the very context of the communications demonstrate, the communications were made with an expectation that they would be held in confidence. The Privilege Log shows that the communications were confined to a limited group, most often client, counsel and Dynamic Credit. Second, as Defendants are aware from the discovery they have already obtained in the adversary proceeding, Dynamic Credit performed a highly specialized role conducting diligence and analyses on complex financial instruments, financing arrangements and underlying collateral that was necessary, or at least highly useful, for the effective consultation with MatlinPatterson's counsel.

22. For example, it should come as no surprise that an evaluation of the *value and quality* of complex financial instruments and underlying assets, especially in a distressed situation, is not a simple mathematical calculation but often entails an assessment of intertwined

[6] Defendants are fond of citing *Sher v. SAF Fin., Inc.*, No. CIV.A. RDB 10-1895, 2011 WL 1484246, at *3 (D. Md. Apr. 19, 2011), for the point that the Trustee in this very bankruptcy case was prevented from claiming attorney-client privilege with respect to certain communications with the Debtor's financial advisor. *See* Motion at 10, n.3. This case does not help Defendants for at least two reasons. First, the Trustee never argued that the financial advisor was necessary or highly useful to the provision of legal advice. *Sher*, 2011 WL 1484246, at *3. Second, the Court carved out from its decision, and did not rule on, documents reflecting counsel's mental impressions. *Id.*

legal and financial matters, including bankruptcy risks, inter-creditor and other issues that might make positions more or less valuable.

23. In the case of Thornburg in particular, as Defendants are aware from their own business dealings, and discovery they have already received, anyone transacting with Thornburg had to understand and navigate a web of complex financing arrangements, assets, liabilities and inter-creditor issues. *See, e.g.,* Motion ¶ 1 (Thornburg's financing arrangements "included ISDA master agreements, master repurchase agreements, global master repurchase agreements, auction swaps, and interest rate caps"); *see also id.* ¶ 2 ("Pursuant to the terms of their Financing Agreements, Thornburg's counterparties, including Defendants, demanded that Thornburg provide them with additional securities or cash payments in order to adequately protect their interests."). This sometimes presented mixed questions of fact and law, such as which assets were encumbered or not, which provided security on which positions, what forms of recourse existed and against whom, and countless other considerations.

24. It is hardly unusual for counsel advising on a potential transaction in this context to engage in privileged communications with its client and a specialist advisor, such as Dynamic Credit, to help navigate these issues and advise on transaction structure and strategy. "As Judge Friendly recognized in *Kovel,* the [attorney-client] privilege must extend to encompass the realities of modern legal practice." *In re Grand Jury Subpoena Dated Mar. 20, 2013,* No. 13-MC-189, 2014 WL 2998527, at *8 (S.D.N.Y. July 2, 2014).[7]

25. For example, confidential communications between a client's counsel and financial advisor in which ***counsel provides advice or comments on draft transaction***

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[7] Defendants argue that because the Privilege Log does not include many e-mail communications *from* Dynamic Credit, they must not have been a necessary advisor. Motion ¶ 24. This argument is nonsensical. It ignores that people can communicate by means other than e-mail. It also ignores the thousands of Dynamic Credit documents that already have been produced.

documents have been held to fall within the attorney-client privilege ***where the communication appears to provide the benefit of legal insight and advice***. *See Urban Box Office Network, Inc. v. Interfase Managers, L.P.*, No. 01 CIV. 8854 (LTS)(THK), 2006 WL 1004472, at *7 (S.D.N.Y. Apr. 18, 2006) (describing "[d]ocument # 52" as a communication between counsel and financial advisor "in which counsel provided advice and comments on a Disclosure Schedule [to stock purchase agreement]" and holding communication (and similar documents) privileged, despite inclusion of financial advisor, because they "appear[] to provide the benefit of legal insight and advice"); *id.* (describing "[d]ocument # 55" as "an e-mail from an attorney to [financial advisor] . . . forwarding drafts of the Disclosure Schedule [to stock purchase agreement]" and holding draft privileged because "it appears to have been drafted by attorneys" and "[i]ts completeness and accuracy clearly had legal implications with which attorneys would be concerned"); *id.* at *9 (describing "[d]ocument # 68 [as] reflect[ing] communications among the financial advisors, [the client's] board members, and attorneys, regarding a draft of the term sheet outlining the proposed stock purchase agreement with Defendants," and holding communication privileged because "[t]he parties comments are being shared with counsel, and it is clear that the advice and suggestions of counsel are being sought."). As reflected above, numerous documents in Categories One and Two fit squarely within this holding.

26. Similarly, communications among client, counsel and financial advisor have been held privileged where they involve "a mixed question of fact and law, which a responsible law firm . . . would not be able to adequately resolve without the benefit of an [advisor's] expert assessment . . . ." *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp. 2d 207, 209 (S.D.N.Y. 2000). In *Calvin Klein*, the Court extended privilege to communications among client, counsel and investment banker because the investment banker was providing expert

advice on the mixed question of what a reasonable business person would consider “material” for purposes of draft disclosure documents. *See id.* The Court reasoned that the investment banker’s role was akin to the interpretive function of an accountant as described in *Kovel*. *See id.* (citing *Kovel,* 296 F.2d 918).

27. If an investment banker plays a legally privileged interpretive function when simply helping a law firm resolve questions of materiality for a disclosure document, then the privilege certainly extends to a specialist such as Dynamic Credit providing expert advisory assistance to client and counsel working on potential funding and financing terms by analyzing the value and quality of distressed collateral in the context of a complex financial structure. As reflected above, many documents in each Category of privileged documents are covered by this holding.

28. The decision in *Stafford Trading, Inc. v. Lovely*, No. 05-C-4868, 2007 WL 611252, at *6-7 (N.D. Ill. Feb. 22, 2007), in which the Court discussed and applied the foregoing S.D.N.Y. precedent, is also instructive.

29. In *Stafford Trading*, Goldman Sachs was retained as investment banker to assist its client as a seller in a potential transaction in which the client was also represented by counsel. Goldman Sachs “performed due diligence on the . . . businesses and gained important, detailed knowledge about . . . corporate structures and operations . . . and frequently communicated with [counsel] regarding the transaction.” *Id.* at *1. Applying S.D.N.Y. case law, the Court determined that a collection of documents comprised of communications from counsel to Goldman Sachs and the client “providing legal advice regarding the drafting of the Asset Purchase Agreement and the structure of the . . . transaction” were privileged. *Id.* at *9.

30. The Court held similarly with respect to various other documents, including comparisons of former and current versions of draft merger agreements exchanged between the client, counsel and Goldman Sachs, because the communications sought or contained legal advice necessary to facilitate the transaction. *See*, *e.g.*, *id.* at *9 (“*Document 19:* A comparison of a former and current draft merger agreement from Kirkland to Stafford, Sullivan & Cromwell, and [Goldman Sachs] for the purpose of providing legal advice. PRIVILEGED.”); *id.* (“*Document 20:* An email from [Goldman Sachs] forwarding to Kirkland term sheets for blacklining. Because [Goldman Sachs] was acting as Stafford's agent, seeking legal advice necessary to facilitate the transaction, the Court finds that the document is privileged. PRIVILEGED.”).

31. As these cases demonstrate, the documents on the Privilege Log are privileged because they were made in confidence and actually reflect counsel’s advice and/or were made for the purpose of obtaining or providing legal advice and included Dynamic Credit because of the necessary, highly useful, and specialized function Dynamic Credit played in facilitating and supporting the legal advice the client received.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion.

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